No. 93-283 (3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

FONAR CORPORATION,

Petitioner,

—v.—

DECCAID SERVICES, INC., MEDICAL FUNDING OF AMERICA, INC., DAVID SMITH, MORTON MACKOF, STEVEN STECKLER, LOUIS TREGLIA and PETER KIM,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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FONAR CORPORATION,

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DECCAID SERVICES, INC.,
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PETITIONER'S REPLY MEMORANDUM

Respondents admit, as they must, that the Second Circuit denied Fonar the opportunity to oppose their application for a Writ of Mandamus before the Writ issued. Their response to Fonar's arguments and cited authorities, which establish that such denial violated Rule 21(b) of the Federal Rules of Appellate Procedure, due process, and the requirements set out by this Court for issuance of a Writ of Mandamus, is to declare that the issues are "unimportant" (Respondent's Brief in Opposition at 7-9), not meriting issuance of this Court's Writ of Certiorari. We disagree.

I. The Second Circuit's Failure to Comply With Federal Rules of Appellate Procedure, Due Process, and the Requirements for Mandamus, Warrant Issuing This Court's Writ of Certiorari

Contrary to Respondents' claim, each of the grounds urged by Fonar involves important, broadly applicable issues of federal law and judicial administration, that warrant issuance of this Court's Writ of Certiorari.

Recognizing that denial of an opportunity to be heard on Respondents' application for a Writ of Mandamus would be a violation of Fed. R. App. P. 21(b) and a denial of Fonar's due process rights warranting a Writ of Certiorari, Respondents assert that Fonar had opportunities to be heard, including Fonar's application for leave to reconsider the Mandamus. (Resp. Br. at 7-12) But, as set forth in Point III below, Fonar had no opportunity to oppose Respondents' application either before the writ issued, or after.

However, even if Respondents were right, and Fonar's application for leave to move for reconsideration were actually considered by the Second Circuit, it is no less a violation of Fonar's right to due process, nor does it remedy or excuse the Second Circuit's failure to afford to Fonar its right to timely oppose the petition for a Writ of Mandamus, expressly provided by Fed. R. App. P. 21(b). See Armstrong v. Manzo, 380 U.S. 545, 14 L.Ed.2d 62, 85 S.Ct. 1187 (1965) ("Armstrong") and Johnson v. United States, 805 F.2d 1284 (7th Cir. 1986), reh'g and reh'g en banc denied (1987), ("Johnson"), both cited by Respondents.

a. Fonar Was Denied Due Process

In Armstrong, as Respondents have pointed out, this Court held that due process of law required that a litigant have the opportunity to be heard "at a

meaningful time and in a meaningful manner." 380 U.S. at 552, 14 L.Ed.2d at 66. Respondents did not point out that this Court determined that the failure to give a litigant the opportunity to be heard before deciding an issue against him, constituted a denial of due process, which was not cured even by a hearing on the merits to set aside the prior decision against him, because that improperly shifted the burden of proof. Id. at 551, 14 L.Ed.2d at 66. Here, it was Respondents' burden to establish a clear and indisputable right to the writ in the first place. By failing to afford Fonar the opportunity to oppose the application before issuing the Mandamus, and limiting Fonar to the discretionary and limited review available after the Writ issued, necessarily deprived Fonar of due process. "Only [considering the application anew] would have restored the petitioner to the position he would have occupied had due process of law been accorded him in the first place." Id. at 552, 14 L.Ed.2d at 67.

b. **The Federal Rules of Appellate Procedure Assure Consistency in the Circuits and Due Process**

Surprisingly, Respondents argue that the Second Circuit's violation of Fed. R. App. P. 21(b) is not "a departure from the usual and accepted course of proceedings which requires exercise of this Court's jurisdiction" (Resp. Br. at 10-11). To the contrary, such a departure from the express requirement of Rule 21, shows that the Writ of Certiorari should issue in the exercise of this Court's supervisory authority over the federal judicial system.

And it is clear from the very cases cited by Respondents, that the violation of Rule 21(b), whether intentional or inadvertent, requires reversal.

Respondents cite Johnson for the proposition that a rule violation does not always require reversal, and that such violation is not necessarily a Due Process denial. However, although Johnson did not reverse the District Court, despite a clear violation of Rule 32 of the Federal Rules of Criminal Procedure, it declined to do so only because the rule violation was raised on a collateral challenge under 28 U.S.C. § 2255, where "[t]he grounds for relief... are narrower than the grounds for relief on direct appeal." Id. at 1287. Had Johnson taken a direct appeal, the Seventh Circuit declared that "we would have reversed and directed the judge to comply with Rule 32 and resentence Johnson." Id. Having rejected Johnson's assertion of the rule violation, Judge Posner separately analyzed his claim of a due process violation, finding no such violation because Johnson's counsel reviewed and had the opportunity to respond to the presentence report. Here, Fonar's petition is the way to obtain direct review of the rule violation, and under the principle in Johnson, the Mandamus should be reversed.

Further, the due process claim here -- deprivation of the right to be heard -- is a constitutional right which stands on its own, and has been guarded by this Court for nearly two centuries. The Trustees of Dartmouth College v. Woodward, 4 Wheat (17 U.S.) 518, 4 L.Ed. 629 (1819).

II. Mandamus Was Not Properly Issued Because Respondents Met None of the Requirements

a. The District Court did not Usurp Power

The Petition cited just some of the many decisions that utilized, and upheld under Fed. R. Civ. P. 26, restrictions on the use and dissemination of proprietary or confidential information. (Pet. at 15.) Accordingly,

the District Court's order could not be viewed as a "usurpation of power".

To escape the effect of these authorities, not even referred to in the opposing brief, Respondents urge a different species of usurpation of power: the alleged dis-regard of the Court of Appeals' mandate. That however, is based on a misreading of the Second Circuit's prior opinion, Fonar Corporation v. Deccaid Services, Inc., 983 F.2d 427 (2d Cir. 1993) (the "January 11 Decision") which related to a different confidentiality order (the "February 25 Order") (Resp. Br. at 15). In fact, there was no mandate with respect to the February 25 Order, and the District Court indeed followed the suggestion of the Second Circuit.

Respondents erroneously rely on Oswald v. McGarr, 620 F.2d 1190 (7th Cir.), reh'g denied (1980) and Yablonski v. United Mine Workers of America, 454 F.2d 1036 (D.C. Cir. 1971), cert. denied, 406 U.S. 906, 31 L.Ed.2d 816, 92 S.Ct. 1609 (1972). In Oswald, the Court stated that, "[a] writ will issue only if [the judge] violated a nondiscretionary command or so abused his discretion that he can be said to have disregarded our mandate." Id. at 1196. There, a prior Seventh Circuit decision had laid out guidelines for procedures and notices in class action. Nevertheless, the Seventh Circuit denied Mandamus even though the District Court order approved notice of settlement of certain claims contrary to the guidelines, and as to which the Seventh Circuit had expressed reservations. Id. at 1197. Similarly in Yablonski, the Court of Appeals had "furnished the district court with unequivocal standards" that were ignored by the District Court. Id. at 1039.

Here, the Second Circuit made a suggestion, only, that the February 25 Order be reconsidered; the only guidance it gave was to state that the February 25

Order was indefinite and uncertain. The May 11 Order involved here (Pet. 6a-21a and reproduced here without the markings of the Second Circuit as R1a-R18a) certainly responded to the Second Circuit's concern, providing the definiteness and certainty which the Second Circuit indicated were necessary.

Contrary to Respondents' claim, the Second Circuit's suggestion could not have been intended to determine the scope of a confidentiality order. Not only is the validity of Fonar's claim to trade secret and confidential status for its Source Code, schematic diagrams, etc., one of the ultimate issues in the case[1], but the Second Circuit, itself, did not believe that its January 11 opinion had directed entry of a "less onerous" order. The May 11 order -- as modified by the Second Circuit -- is far more protective than the February 25 Order. If the Second Circuit, itself, wrote a "more onerous" order, entry of the May 11 Order in its original form by the District Court could not be inconsistent with the Second Circuit's January 11 Decision on that ground.

Accordingly, the first and most basic test for issuance of a Writ of Mandamus has not been met: the District Court did not violate a nondiscretionary command, and rather than disregard the suggestion of the Second Circuit, the District Court followed it. There was, therefore, no usurpation of power.

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[1] Because a less restrictive confidentiality order could well irretrievably undermine Fonar's rights, it is not plausible that the Second Circuit was directing the District Court to decide the basic issue of secrecy without a hearing. Indeed, Respondents themselves admit that those issues "remain to be resolved by the fact finder at the district court level." (Resp. Br. at 10.)

b. The District Court did not Abuse Its Discretion

Alternatively, Respondents argue that the May 11 Order was an abuse of discretion, relying upon Bridge C.A.T. Scan Associates v. Technicare Corp., 710 F.2d 940 (2d Cir. 1983) and International Products Corp. v. Koons, 325 F.2d 403 (2d Cir. 1963). Respondents, however, ignore the fact that the Second Circuit, even with its modifications, did not find that the confidentiality order represented an abuse of discretion.

Both the Bridge and the Koons cases expressly reaffirmed the right, power and, we submit, the duty of a District Court to protect with a confidentiality order information asserted by a litigant to be confidential, "obtained by one party from another by use of the court's processes." (Emphasis added.) Koons, 325 F.2d at 407; Bridge, 710 F.2d at 943. These cases involved confidentiality orders that violated the first amendment rights of a party by purporting to restrict the use of public information, obtained independently, prior to the litigation (and certainly not within the context of discovery in the litigation) and not in violation of the protected party's rights.

Here, all the information covered by the Confidentiality Order has been produced in discovery in this action. Fonar's Source Code, field service files and other internal records are not in any way open to the public (or even anyone outside of Fonar). The only items not produced by Fonar in the context of discovery, its schematic drawings and its computer software, were, Fonar asserts, wrongfully misappropriated by Respondents in violation of Fonar's rights.

Respondents are Fonar's direct competitors in the repair and service of MRI equipment. Therefore, the District Court was justified in withholding from

Respondents the Source Code for Fonar software, etc. since it allowed access to their counsel and experts. See cases cited in Petition at 15; see also Johnson v. United States, supra, 805 F.2d at 1289-90.

c. The Right to Post-Trial Appeal Precludes Mandamus

Respondents' assert that they satisfy the second test, lacking an alternative to Mandamus, because they could "not likely" obtain a stronger result than the January 11 Decision (Resp. Br. at 15-16); this is incomprehensible.

First, on the prior appeal, Respondents sought to have the February 25 Order vacated; that relief was denied. See the January 11 Decision, 983 F.2d at 430. Had the Second Circuit desired a stronger order, it would have issued one. Second, the Second Circuit never "indicated that a less restrictive order should issue". No such language or implication appears in the decision or mandate (R19a-R20a). Third, Respondents would have the same right of appeal after the trial as would any party aggrieved by a pretrial discovery ruling. There is no need for Mandamus here.

III. Fonar Never Had a Prior Opportunity to Argue the Rule 21(b) and Due Process Violations

Respondents claim that Fonar had four opportunities to present to the Second Circuit, the violation of Rule 21(b) and denial of Due Process, but failed to do so. This is factually unfounded.

One alleged opportunity was in response to the Second Circuit's June 1 letter (Pet. App. 1a), advising Fonar that the issue was going to be heard on June 8. However, since no one could predict that the Second Circuit would ignore Rule 21(b) or Fonar's due process rights, and since by that very letter, Fonar (and the

District Court) was prohibited from opposing the petition, the claim is frivolous.

Respondents say that Fonar had an opportunity to oppose Respondents' application for Mandamus when it argued an appeal on October 5, 1992. But they do not explain how that could be an opportunity to be heard on an application to the Second Circuit filed over seven months later, regarding an order that was rendered on May 11, 1993, over six months later.

Respondents also claim Fonar could have opposed their Mandamus application when it opposed Respondents' separate motion for a stay of the trial and, again, when Fonar sought leave to move to reconsider the Mandamus. Both claims are untrue. First, since Fonar was prohibited from opposing Respondents' Mandamus application, it could not and did not do so. Furthermore, Respondents' motion for a stay, based on the Second Circuit's rules was not to be considered until June 15, 1993 and Petitioner's papers in opposition to the stay motion were not received by the clerk's office until the end of the day on June 7. Thus, when the panel issued the Mandamus it likely was unaware that Fonar had served papers opposing the stay motion.

Finally, the Second Circuit never considered Fonar's application for reconsideration because leave to make that motion, which is what Fonar sought, was, in a single word, "denied."

In each case cited by Respondents, the argument found to be waived, existed before the issue was put to the court where it was claimed the argument should have been, but was not made. In two of the cases, the argument was not contained in the Petition for Certiorari. United States v. Williams, 504 U.S. ____, 118 L.Ed.2d 352, 112 S.Ct. 1735 (1992) (argument

available before presentation of case to District Court and Court of Appeals); Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc. et al., 492 U.S. 257, 106 L.Ed.2d 219, 109 S.Ct. 2909 (1989) (argument existed but not raised before the District Court or the Court of Appeals, or in Petition for Certiorari); and Deshaney v. Winnebago County Department of Social Services, 489 U.S. 189, 103 L.Ed.2d 249, 109 S.Ct. 998 (1989) (argument existed before but not included in the complaint, not raised before the District Court or Court of Appeals and not included in Petition for Certiorari).

Here, the argument of a 21(b) violation and a Due Process deprivation was created as a result of and only after the Second Circuit considered and decided Respondents' application for Mandamus. Thus, it could not have been raised before the Writ was issued.

CONCLUSION

For the reasons set forth above and in the petition, we respectfully pray the petition be granted.

Dated: New York, New York
October 4, 1993

Respectfully submitted,

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